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Justice Sanford and Modern Free Speech Analysis: Back to the Future?

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I. INTRODUCTION

A recent article on today's United States Supreme Court argues that strong similarities exist between the jurisprudence of the Court of the 1930's and that of the 1980's.[1] The Article contends that "[t]he [Burger] Court's rulings in the civil liberties areas . . . provide a high degree of correlation between the constitutional doctrines used fifty years ago and current political positions."[2]

This Article explores the extent to which these correlations exist, and the reasons they are likely to be increasingly evident in first amendment jurisprudence of the Rehnquist Court. Although case law contains no articulated resurrection of old first amendment doctrines, themes and methods of analysis popular in the 1920's and 1930's are discernible in recent cases involving free speech claims.[3]

A problem that has persisted in the first amendment freedom of speech[4] area since the 1920's is how to strike a constitutionally acceptable balance between the speech interests of the speaker and the legitimate police power concerns of the regulating body.

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[1] Nowak, *Resurrecting Realist Jurisprudence: The Political Bias of Burger Court Justices*, 17 SUFFOLK U.L. REV. 549 (1983).

[2] *Id.* at 589.

[3] *See, e.g., id.* at 589-94.

[4] "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

Although specific tests have been developed in particular areas such as obscenity,[5] libel and slander,[6] and "fighting words,"[7] a question remains as to what method of analysis is appropriate in the more general context of speech regulation.

Following an analysis of two important cases from the 1920's, *Gitlow v. New York*,[8] and *Whitney v. California*,[9] this Article examines two of the major analytical tools used by the modern Supreme Court: the clear and present danger test[10] and the balancing test as set forth in *United States v. O'Brien*.[11] One must ask which of these two modern methods of first amendment review is analytically indicated by the factual situation before a court (or legislature at the other end of the legal process).[12] The main contention of this Article is that the choice

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[5] The first amendment does not protect obscene material. Roth v. United States, 354 U.S. 476 (1957). To determine whether a particular work is obscene, and therefore unprotected, the trier of fact must consider the following three factors:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24-5 (1973).

[6] In Beauharnais v. Illinois, 343 U.S. 250 (1952), the Court held that a state, attempting to maintain peace and order, could impose criminal sanctions for libel directed at a racial group. The standard, however, for awarding damages for libel directed at a public official acting in his official capacity is more stringent. Before damages can be awarded, the official must prove "actual malice." He must prove that the remark was made "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

[7] Fighting words are those that by their nature cause injury or are likely to lead to an instantaneous disruption of the peace. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Fighting words are not protected by the first amendment, and the test employed by the court in determining their existence is whether the language would prompt an average individual to fight. *Id.* at 573.

[8] 268 U.S. 652 (1925). *See* notes 13-35 *infra* and accompanying text.

[9] 274 U.S. 357 (1927), *rev'd*, 395 U.S. 444 (1969).

[10] For a discussion of the "clear and present danger" test, see notes 196-239 *infra* and accompanying text.

[11] 391 U.S. 367 (1968).

[12] Professor Linde decried what he perceived as too strong and automatic a focus on the judicial as opposed to the legislative function in constitutional adjudication:

> If empiricism is a source of strength in judicial review, however, it is also a source of weakness in constitutional law. The weakness results from

of the correct method of analysis is, to a large extent, a function of federalism and separation of powers concepts. Specifically, one must scrutinize the deference a court will show to a federal, state, or municipal legislative body when it attempts to regulate activity that includes or is a result of speech. The closer a legislature is able to connect regulable conduct with speech, the more likely a reviewing court will defer to the legislative judgment concerning the regulation of the speech which is a part of, or attendant to, the conduct.

A. Gitlow and Whitney

When considering the evolution and direction of modern free speech analysis, it is important to consider major historical antecedents that might shed some light on the limits of contemporary doctrine. *Gitlow v. New York*[13] and *Whitney v. California*[14] are two of the seminal cases for modern first amendment theory.[15] *Gitlow* and *Whitney* both involved state laws forbidding advocacy of force or violence as a means of overthrowing the existing government. Justice Sanford wrote the majority opinion in each case,[16] with a strong dissent by Justice

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> seeing constitutional law almost entirely in the framework of adjudication; both judges and commentators habitually analyze constitutional questions in terms of how courts should decide cases. This professional preoccupation with the judicial function not only neglects the legislative function, but worse, it reverses the relationship between the two. The constitutional limits on legislation are, in effect, deduced from the premises of judicial review, not judicial review from the constitutional limits on legislation.

Linde, *"Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1175 (1969-70).

[13] 268 U.S. 652.

[14] 274 U.S. 357.

[15] The law of free speech we know today grows out of the Supreme Court decisions following World War I—*Schenck v. United States, Abrams v. United States, Gitlow v. New York, Whitney v. California*—not out of the majority positions but rather from the opinions, mostly dissents or concurrences that were really dissents, of Justices Holmes and Brandeis.

Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23 (1971-72).

[16] Professor, now Judge, Bork argued that "the law should have been built on Justice Sanford's majority opinions in *Gitlow* and *Whitney*." *Id.*

Holmes in *Gitlow*,[17] and a concurrence, in form but not in substance, by Justice Brandeis in *Whitney*.[18]

Justice Sanford's analysis in *Gitlow* and *Whitney* is important insofar as it reflects an extremely deferential role for the Court in reviewing state legislative acts that restrict the exercise of speech activities.[19] It is precisely the kind of limited review role that is reflected in important first amendment decisions by the Burger Court.

Gitlow was convicted under a New York statute forbidding criminal anarchy—"the doctrine that organized government should be overthrown by force or violence" or any other unlawful means.[20] As a member of the Left Wing section of the Socialist party, he participated in the adoption and publication of a "Manifesto" which, among other things, called for "revolutionary mass action" for the "purpose of conquering and destroying the parliamentary state."[21] Even though Justice Sanford's opinion found that "[t]here was no evidence of any effect resulting from the publication and circulation of the Manifesto,"[22] the Court affirmed Gitlow's conviction.[23]

Whitney was convicted under the California Criminal Syndicalism Act which prohibited the advocacy or teaching "of crime, sabotage . . . or unlawful acts of force or violence . . . as a means of accomplishing a change in industrial ownership or control, or effecting any political change."[24] The Criminal Syndicalism Act also punished any person who "[o]rganizes . . . or knowingly becomes a member of, any . . . group . . . of persons organized or assembled to advocate, [or] teach . . . criminal syndicalism."[25] Whitney was convicted of assisting in the organization of, and being a member of, the Communist Labor Party

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[17] 268 U.S. at 672 (Brandeis, J., joining the dissent).
[18] 274 U.S. at 372 (Holmes, J., joining the concurrence).
[19] *See* note 32 *infra* and accompanying text.
[20] 268 U.S. at 654.
[21] *Id.* at 658.
[22] *Id.* at 656.
[23] *Id.* at 672.
[24] 274 U.S. at 359-60.
[25] *Id.* at 360.

of California.[26] Her conviction was upheld by the Supreme Court.[27]

Because the state laws in *Gitlow* and *Whitney* specifically defined the prohibited speech,

> [T]he Court could choose among three positions. It could (1) accept this legislative judgment of the harmful potential of the proscribed words, subject to conventional judicial review; (2) independently scrutinize the facts to see whether a "danger," [as defined by the legislature] . . . justified suppression of the particular expression; or (3) hold that by legislating directly against the words rather than the effects, the lawmaker had gone beyond the leeway left to trial and proof by . . . the first amendment.[28]

According to Professor, now Judge, Bork, Justice Sanford's majority opinions in both cases chose the first method of review, holding "essentially that the Court's function in speech cases was the limited but crucial one of determining whether the legislature had defined a category of forbidden speech which might constitutionally be suppressed."[29] Once the Court determined that "the category was defined in a permissible way and the defendant's speech or publication fell within the definition," the Court's review role was at an end.[30]

In *Gitlow*, after asserting the "principle that the State is primarily the judge of regulations required in the interest of public safety and welfare,"[31] Justice Sanford espoused an extremely deferential role for a court when it reviews a statute passed pursuant to a state's police power.

> In other words, *when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive*

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[26] *Id.* at 372.
[27] *Id.*
[28] Linde, *supra* note 12, at 1171.
[29] Bork, *supra* note 15, at 32.
[30] *Id.*
[31] 268 U.S. at 668.

> *evil that they may be punished*, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.[32]

Both *Gitlow* and *Whitney*[33] reflect an analysis in which the primary question for a court reviewing a statute specifically proscribing certain speech is whether the legislature has properly determined that the speech activity "involves" such danger of substantive evil that the speech activity may be regulated attendant to the prohibition or punishment of the substantive evil.[34] Once the court determines that the legislature properly asserted the requisite "involvement" of substantive evil with speech activity, the court's review role is at an end.[35]

Obviously, an acceptable legislative declaration that a certain kind of speech activity causes or is accompanied by a prohibitable substantive evil is the *sine qua non* of a *Gitlow-Whitney* method of analysis.[36] An important question in modern free speech theory concerns the method by which a legislature posits the nexus between speech activity and substantive evil. Against

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[32] *Id.* at 670 (emphasis added).

[33] By enacting the provisions of the Snydicalism Act the state has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the state, that these acts should be penalized in the exercise of its police power.

274 U.S. at 371.

[34] 268 U.S. at 668-69.

[35] When Benjamin Gitlow, a former Socialist member of the New York Assembly, and his associates were prosecuted under the Criminal Anarchy Act for publishing their Left Wing Manifesto, the Supreme Court deferred to a supposed legislative judgment that their doctrines . . . carried with them enough substantive danger to justify their suppression.

Linde, *supra* note 12, at 1176.

[36] *Id.* at 1171.

this background, this Article considers different factual patterns in which this question might arise.

II. FACTUAL PATTERNS OF REGULATION

A. *The Conduct-Speech Spectrum*

Different combinations of regulable conduct and presumptively protected speech run along a spectrum. At one extreme, exemplified by the factual posture of a "symbolic speech" case,[37] is the situation in which the speaker creates a simultaneous conduct evil[38] while engaging in symbolic speech[39] which the government may legitimately regulate. In this situation, the government may impose a restriction on the simultaneously occurring speech activity to regulate the conduct evil. The government, acting pursuant to a legitimate constitutional power source,[40] has declared that the speech and the conduct occur simultaneously, thereby removing any contingency that might exist between the speech and the conduct evil. If simultaneity of speech and conduct exists, there is a one-hundred percent correlation between the occurrence of the speech and the occurrence of the conduct

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[37] *See* notes 60-106 *infra* and accompanying text.

[38] *See* notes 83-100 *infra* and accompanying text.

[39] As this Court has repeatedly stated, these [first amendment] rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities.

Brown v. Louisiana, 383 U.S. 131, 141-42 (1966). *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 292-98 (1970) (discussing first amendment protection of various forms of expression and the division between expression and action).

[40] The role of the judiciary in ensuring that a legislature has acted within a legitimate power source was aptly described by Chief Justice Marshall:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

evil, both in time and in logic. Assuming that a legislature is able to establish such a correlation, a reviewing court would be hard pressed to invalidate the regulation because of its effect on speech when such an invalidation would leave the speaker/actor free to engage in the conduct evil.

Justice Douglas, characterizing picketing as "free speech plus,"[41] asserted "[t]hat means that it can be regulated when it comes to the 'plus' or 'action' side of the protest. It can be regulated as to the number of pickets and the place and hours . . . because traffic and other community problems would otherwise suffer."[42] In a picketing case, the communicative activity and the conduct evil are intertwined. They cannot be separated, so an appropriately narrow state regulation designed to avoid the conduct evil would be upheld even though it incidentally impinged upon the speech interests of the picketers.[43]

Moving along the spectrum, in some situations the legislature is not able to establish that the conduct evil happens simultaneously with the speech. Sometimes the conduct evil will flow inevitably from the speech. This fact pattern is reflected by a case involving a zoning ordinance that dispersed adult movie theaters based on the assumption that clustering these theaters would result in an increase in crime and a decrease in property values.[44] Despite the absence of simultaneity between the speech and the conduct evil, a court is likely to defer to the legislative

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[41] Brandenburg v. Ohio, 395 U.S. 444, 455 (1969) (Douglas, J., concurring).

[42] *Id.* at 455-56.

[43] Since *Thornhill v. Alabama*, 310 U.S. 88 (1940), the Court has recognized that peaceful picketing is within the protections of the first amendment. Justice Murphy, in *Thornhill*, "was the first to express the doctrine that [peaceful picketing] . . . is still another type of 'liberty' within the Fourteenth Amendment." He stated:

> Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.

Id. at 102 (*cited in* ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES at 435-36 (1969)).

[44] *See* Young v. American Mini-Theatres, 427 U.S. 50 (1976). *See also* notes 107-195 *infra* and accompanying text.

determination that the conduct evil always follows the speech.[45] Once again, the contingency between the occurrence of speech and the occurrence of the conduct is removed; here, not through a showing of simultaneity of the two events, but by a legislative declaration that the conduct evil always follows the speech. As in the "symbolic speech" case, the ability of a legislature to regulate the conduct evil would likely encompass the ability to restrict the speech that the legislature has determined is a precursor of the conduct.

Moving away from situations where there is a coincidence of speech and conduct evil, the appropriate method of analysis is the clear and present danger test.[46] The factual posture of a case analyzed under the clear and present danger test differs in one important way from cases analyzed under the balancing test used in the first two situations. The main difference is that the clear and present danger test is used in cases in which the legislature is unable to establish, by way of a legislative finding, that the regulable conduct evil will always happen upon the occurrence of the communicative activity.

Brandenburg v. Ohio,[47] probably the leading case in the area,[48] presents the prototypical factual situation calling for analysis under the clear and present danger test. In *Brandenburg*, the United States Supreme Court reversed a speaker's conviction under the Ohio Criminal Syndicalism statute because the statute proscribed mere advocacy of action, irrespective of whether the advocacy was "directed to inciting or producing imminent lawless action and . . . [was] likely to incite or produce such action."[49]

Implicit in *Brandenburg* and other versions of the clear and present danger test[50] is the fact that the legislature has not

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[45] *See* notes 146-57 *infra* and accompanying text for a discussion of this principle in the context of *Young*.

[46] For a discussion of the clear and present danger test, see notes 196-239 *infra* and accompanying text.

[47] 395 U.S. 444 (1969).

[48] For a discussion of the evolution of the clear and present danger test, see Strong, *Fifty Years of 'Clear and Present Danger': From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41.

[49] 395 U.S. at 447.

[50] For a discussion of various formulations of the clear and present danger test,

established a one-hundred percent correlation between the occurrence of the speech and the occurrence of a regulable conduct evil because it cannot do so.[51] The occurrence of the regulable conduct evil is situationally determined. If circumstances are right, the conduct evil will follow the speech. If they are not, nothing happens that is within the regulatory purview of the legislature. For example, in situations involving certain kinds of speech, the legislature is unable to remove the contingency that exists as between the speech activity and the regulable conduct evil. The conduct evil might follow the speech or it might not. In these cases, the police,[52] licensing authorities,[53] or courts[54] must determine, on a case-by-case basis, whether the government has shown a sufficient nexus[55] between the speech in question and the regulable conduct evil.

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see Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159 (1982).

[51] *See* 395 U.S. 447-48.

[52] For an example of a case in which the decision revolved around the appropriateness of police reaction to a potentially dangerous speech situation, see Feiner v. New York, 340 U.S. 315 (1951).

[53] For a useful explanation of first amendment restrictions on the implementation of licensing schemes, see Niemotko v. Maryland, 340 U.S. 268 (1951); Lovell v. Griffin, 303 U.S. 444 (1938).

[54] A specific kind of restraint on speech occurs when a speaker is prevented from speaking by a court injunction or temporary restraining order. *See* Walker v. City of Birmingham, 388 U.S. 307 (1967).

[55] Professor Strong discussed the Court's use of the clear and present danger test as a means of establishing the nexus between speech activity and regulable conduct:

> Elevated to constitutional level, the danger test, retaining much of its original evidentiary flavor, became a device whereby, for legislation to pass constitutional muster, it must be demonstrated that a permissible objective of government is imminently and substantially threatened. Permissible objectives were identified without analysis as "certain substantive evils" with respect to which government possessed some authority. Yet by the new test government was empowered to take action only on proof of the immediacy of serious peril to one or more of those substantive evils. The following paragraph from the *Abrams*' dissent specifies the reach of the test as a potent yet not total construction on governmental power with respect to utterances:
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> > I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck*, *Frohwerk*, and *Debs*, . . . were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring

At this end of the conduct-speech spectrum, there is such a low correlation between the occurrence of the speech and the conduct evil that the only tenable method of analysis takes into account all the variables involved[56] in the infinite number of situations that might arise.

Looking at the different factual situations on the conduct-speech spectrum, it is crucial to keep in mind the legislative or judicial function in formulating or reviewing statutes or regulations that attempt to regulate speech activity.[57] At the legislative end of the process, one must ask whether a legislature can legitimately assert that a regulable conduct evil is an inevitable result of a particular kind of speech activity. Once the statute or regulation is challenged in court, the threshold question is whether the court believes that the legislature has made a defensible decision regarding the closeness of the nexus between speech and conduct.[58] Separation of powers and federalism issues come into play at this point. The question is whether a court should defer to a legislative determination that speech activity may be regulated because it bears a close enough connection to some legislatively regulable conduct evil.

> about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

Strong, *supra* note 48, at 46 (citing Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616, 627-28 (1919)).

[56] For a discussion of the elements of the clear and present danger test, see notes 221-38 *infra* and accompanying text.

[57] Professor Linde addressed the primacy of the legislative function in first amendment analysis:

> The first amendment . . . is addressed expressly to lawmakers. It is not, in the first instance, an instruction to courts directing judges to protect freedom of speech, press, assembly, and petition. That judicial role indeed follows from judicial review. But the apprehension expressed in the first amendment is that legislators might decide to establish a religion, or prohibit the exercise of another, or suppress disfavored speech or publications by law, not that executive officers might do so illegally. So the first amendment forbade Congress to make such laws long before a judicial role in defining those freedoms was established.

Linde, *supra* note 12, at 1175.

[58] *Id.* at 1171.

Legislative removal of the contingency between speech activity and conduct evil is at the heart of the court's analysis of all situations, from symbolic speech cases to clear and present danger cases. This analysis not only provides a coherent frame of reference by which to analyze and synthesize past cases, it also provides a useful method of analyzing situations likely to be at the forefront of first amendment law in the future.[59]

This Article now turns to an analysis of the major types of cases running along the speech-conduct spectrum. A close examination of each will shed some light on the importance of separation of powers and federalism principles in the free speech area.

B. United States v. O'Brien

In *O'Brien*,[60] the defendant was convicted in federal district court for violating the federal statute[61] prohibiting the knowing destruction or mutilation of a draft card. O'Brien burned his Selective Service registration certificate on the steps of the South Boston Courthouse in front of a large crowd, including several FBI agents.[62] It is important to note that immediately after the burning of the draft card, members of the crowd began attacking O'Brien.[63]

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[59] For an example of a current issue dealing with a legislature's attempt to define "pornography" as a violation of women's rights, see notes 287-305 *infra* and accompanying text.

[60] 391 U.S. 367 (1968).

[61] The indictment upon which [O'Brien] was tried charged that he "willfully and knowingly did mutilate, destroy and change by burning . . . [his] Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App., United States Code, Section 462(b)." Section 462(b) is part of the Universal Military Training and Service Act of 1948. Section 462(b)(3), one of six numbered subdivisions of § 462(b), was amended by Congress in 1965, 79 Stat. 586 (adding the words italicized below), so that at the time O'Brien burned his certificate an offense was committed by any person, "who forges, alters, *knowingly destroys, knowingly mutilates*, or in any manner changes any such certificate. . . ."

Id. at 370.

[62] *Id.* at 369.

[63] *Id.* For an analysis of this aspect of the case, see note 80 *infra* and accompanying text.

In a pretrial motion to dismiss the indictment, O'Brien[64] argued that the provision of the Selective Service Act under which he was prosecuted was unconstitutional because it was enacted to abridge free speech and served no legitimate legislative purpose.[65] The district court rejected O'Brien's first amendment argument and the United States Supreme Court ultimately upheld that decision.[66]

After rejecting O'Brien's argument that the law was facially invalid as a regulation of speech,[67] the Court turned to his contention that the law was unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech".[68] After allowing that O'Brien's activity was sufficiently communicative to implicate the first amendment,[69] the Court noted that it had previously "held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on first amendment freedoms."[70] In setting forth a four-part balancing approach,[71] the Court stated,

> A government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an

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[64] "The issue of the constitutionality of the 1965 Amendment was raised by counsel representing O'Brien in a pretrial motion to dismiss the indictment. At trial and upon sentencing, O'Brien chose to represent himself. He was represented by counsel on his appeal to the Court of Appeals." *Id.* at 370 n.3.

[65] *Id.* at 370.

[66] *See id.* at 372.

[67] We note at the outset that the 1965 Amendment plainly does not abridge free speech on its face, and we do not understand O'Brien to argue otherwise. Amended § 12(b)(3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct.

Id. at 375.

[68] *See id.* at 376-82.

[69] *Id.* at 376.

[70] *Id.*

[71] Professor Ely considers the first prong of the *O'Brien* test to be superfluous on the basis that it is subsumed under prong two, that the government regulation "furthers an important or substantial governmental interest." Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1483-84 n.10 (1974-75).

> important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[72]

The first prong of the *O'Brien* test is easily met. The Court stated that the power of Congress to raise and support armies,[73] including the power to classify and conscript manpower for military service, is a broad and sweeping power.[74] Looking at prongs two and three of the *O'Brien* test, the question of nexus between speech and conduct evil becomes relevant. Those two prongs require that the government have an important or substantial interest in regulating the symbolic speech and such interest be unrelated to the suppression of free expression.[75]

Before looking at the governmental interests in prohibiting the burning of a draft card, it is important to note that in *O'Brien* the symbolic speaker was the one engaged in the conduct evil proscribed by Congress.[76] O'Brien was not prosecuted under the federal law for inciting anyone else to engage in illegal conduct.[77] The fact that the speaker who, by his symbolic speech,

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[72] 391 U.S. at 377.

[73] U.S. CONST. art. 1, § 8, cl. 12.

[74] "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." 391 U.S. at 377 (citing Lichter v. United States, 334 U.S. 742, 755-58 (1948)).

[75] For an argument that Congress was, in fact, trying to suppress speech by virtue of its prohibition of the destruction or mutilation of draft cards, see Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 15-16:

> On the basis of this legislative history, it is not open to doubt that the attitude of defiance manifested in the draft-card burnings was what represented the threat seen by Congress, and that the infuriating offensiveness of this mode of dissent was what drove Congress to prohibit it. Which is to say that Congress was engaged in the abridgment of speech when it enacted the amendment, that O'Brien's First Amendment claims were not frivolous, and that these claims were entitled to more serious consideration than they were given by the Court, despite the hatefulness of the ideas expressed or the infuriating offensiveness of the manner of their expression.

[76] *See* text accompanying note 62 *supra*.

[77] If O'Brien had been arrested for creating a breach of the peace in violation of

engages in the regulable conduct evil makes it possible for Congress to assert a simultaneity between the speech and the conduct evil. The government may legitimately contend that there is no time gap and no contingency between the speech and the conduct evil. This situation is similar to a sit-in,[78] or a flag desecration case[79] in which the protester, by way of his symbolic speech, engages in some conduct evil that the government may have a right to prohibit or punish.

This kind of case differs, therefore, from one in which a speaker engages in some communicative activity that incites another person to engage in a regulable conduct evil. Consider, for example,[80] that O'Brien was attacked by members of the crowd immediately after the draft card burning. Assume that local police officers were present, and at the time of the attack, they moved forward to arrest O'Brien for violating a state statute forbidding speaking in such a way as to incite a breach of the peace. Under this fact pattern, O'Brien would still be engaged in symbolic speech, but the crowd actually would be engaging in the conduct evil breaching the peace. There, both a time gap and a contingency would exist between O'Brien's symbolic speech and the conduct evil. The crowd takes some time to react, and it is not certain that they will react at all, let alone in an illegal way. In this situation, the only acceptable method of regulating O'Brien's speech would be through use of clear and present danger principles.

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a state statute, he could have been prosecuted under both the federal and state laws. *See* Abbate v. United States, 359 U.S. 187 (1959) (petitioner's prior conviction under an Illinois statute for conspiring to injure or destroy the property of another does not bar a separate indictment and conviction for the same conspiracy based on federal law); Bartkus v. Illinois, 359 U.S. 121 (1959) (petitioner's prior acquittal for a federal offense of robbing a federally insured bank does not prevent an Illinois prosecution for a violation of its own penal law on substantially the same evidence).

[78] *See generally* Brown v. Louisiana, 383 U.S. 131 (1966) (reversing the petitioner's conviction of provoking a breach of the peace by refusing to leave a library that maintained a segregation policy).

[79] *See generally* Spence v. Washington, 418 U.S. 405 (1974) (reversing the petitioner's conviction of improperly using the United States flag by displaying it out an apartment window with an attached peace symbol).

[80] *See* note 63 *supra* and accompanying text.

The governmental justifications for the Selective Service law under which O'Brien was prosecuted are now examined. Issues that should be considered are what the conduct evil is, as well as who actually engages in the evil, and whether there is any uncertainty or contingency regarding the occurrence of the conduct evil once O'Brien's speech activity has occurred.

In addition to the initial notification, the Court identified four governmental interests[81] advanced by the Selective Service provision involved in the *O'Brien* case.[82] These purposes were defeated when O'Brien burned his draft card.[83] Congress' articulation of the interests[84] demonstrates a simultaneity between the

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[81] The certificates are proof of registration which allow the Selective Service System to verify registration and classification of suspected delinquents; the registrant's Selective Service number and the address of his local board supplied on the certificates further communication between the registrant and his local board; the certificates serve to remind the registrant to notify his local board of a change of address or status; the certificates help detect alterations and forgeries. 391 U.S. at 378-80. *See* notes 77-85 *infra* and accompanying text.

[82] *See* note 61 *supra.*

[83] We agree that the registration certificate contains much more information of which the registrant needs to notification. This circumstance, however, does not lead to the conclusion that the certificate serves no purposes, but that, like the classification certificate, it serves purposes in addition to initial notification. *Many of these purposes would be defeated by the certificates' destruction or mutilation.* (Emphasis added).

391 U.S. at 378.

[84] See H.R. REP. No. 747, 89th Cong., 1st Sess. 1-2 (1965), where the Committee on Armed Services reported favorably on amending the Universal Military Training and Service Act of 1951 to include "knowingly destroys" and "knowingly mutilates":

> The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.
>
> While the present provisions of the Criminal Code with respect to the destruction of Government property may appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals, *the committee feels that in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of Congress that such wanton and irresponsible acts should be punished* (Emphasis added).

But see 111 CONG. REC. 19,871 (1965), where Rep. Rivers, the sponsor of the bill, said:

> The purpose of the bill is clear. It merely amends the draft law by adding the words "knowingly destroys and knowingly mutilates" draft

symbolic speech and the conduct evil addressed by the statute. If simultaneity between speech and conduct evil exists, then a one-hundred percent correlation exists between the exercise of the communicative activity and the creation of the conduct evil.

The Court declared that the issuance of registration and eligibility classification certificates was "a legitimate and substantial administrative aid in the functioning of [the Selective Service] system"[85] and characterized the statute in *O'Brien*[86] as "legislation to insure the continuing availability of issued certificates,"[87] generally serving a substantial purpose in the system's administration. When O'Brien burned his draft card, he frustrated the general purpose of protecting the administration of the Selective Service System[88] and the four specific purposes of the law.

The Court accepted the government's argument that availability of the registration and eligibility certificates "relieves the Selective Service System of the administrative burden it would otherwise have in verifying the registration and classification of

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cards. A person who is convicted would be subject to a fine up to $10,000 or imprisonment up to 5 years. It is a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards.

We do not want to make it illegal to mutilate or destroy a card per se, because sometimes this can happen by accident. But if it can be proved that a person knowingly destroyed or mutilated his draft card, then under the committee proposal, he can be sent to prison, where he belongs. *This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own government.* (Emphasis added).

See also id. at 20,433 where Sen. Thurmond remarked:

The President has acknowledged that our country is engaged in a war. Attempts to interfere with the Universal Military Training Act or service in the Armed Forces constitutes treason in time of war. Such conduct as public burnings of draft cards and public pleas for persons to refuse to register for their draft should not and must not be tolerated by a society whose sons, brothers, and husbands are giving their lives in defense of freedom and countrymen against Communist aggression.

[85] 391 U.S. at 377.

[86] *See* note 61 *supra.*

[87] 391 U.S. at 377-78.

[88] *See* note 81 *supra.*

all suspected delinquents."[89] Focusing on the availability of the certificates, the Court emphasized that because the certificates are in the nature of "receipts," indicating that the registrant has complied with the law, "it was in the interest of the administration of the system that they be continually available, in case, for example, of a filing error."[90] The important point is that the Court accepted the government's arguments regarding the continued availability of the draft certificates. If availability is the salient feature of the regulatory scheme, then destruction or mutilation of the certificates serves immediately to defeat this specific purpose of the statute and, therefore, simultaneity exists between the burning of the draft card and the impairment of one of the legitimate goals of the Selective Service System.

A second rationale of the law under which O'Brien was convicted is that "[t]he information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefiting all concerned."[91] Therefore, the availability of the draft certificate is important so a registrant may communicate his number to his local board when he supplies or requests information.[92] The Court also accepted the argument that continued availability of the draft certificates allows a local board, other than the registrant's own local draft board, to answer questions regarding the registrant's eligibility status. Absent the certificates, the board's ability to answer the registrant's question "would be considerably complicated."[93] The lack of availability caused by burning the draft card frustrates the communication between the registrant and his own or another local draft board. The Court, therefore, accepted the legislative presumption that, because the destruction of some draft certificates might impair the functioning of the Selective Service System, Congress can prohibit all registrants from mutilating or destroying their Selective Service certificates.[94]

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[89] 391 U.S. at 378.

[90] *Id.* at 379.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Contra* Alfange, *supra* note 75, at 15:

When a war protester burns his draft card, he does so entirely because of

A third justification for the requirement of continual availability of Selective Service certificates is that they "carry continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status."[95] In terms of the destruction of the certificates causing an immediate disruption of the system, the Court asserted that "the destruction of certificates deprives the system of a potentially useful notice device."[96] Again, this conduct evil, regulated by Congress in its powers over the military occurs simultaneously with the symbolic speech activity of burning one's draft card. Congress posited, and the Court accepted, a simultaneity of occurrence between the symbolic speech activity and the regulable conduct evil.[97]

The fourth purpose that the prohibition against destruction of Selective Service certificates advances is to enhance the detection of the alteration, forgery, or other deceptive misuse of the draft certificates.[98] Continual availability is an aid to insuring the preservation of draft certificates in their original condition. Mutilation or destruction of the certificates immediately destroys the opportunity of Selective Service authorities to use this particular means of detecting and tracing abuses of the system.

Examination of the four congressional interests illustrates that O'Brien engaged in the proscribed conduct evil by virtue of his symbolic speech activity. As Congress posited and the Court accepted, the destruction of draft certificates impairs the smooth functioning of the Selective Service System.[99] Thus, it follows that complete congruence exists between the occurrence of the

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the value of the act as expression. The burning has never been intended as a means of interfering with the draft, not because the protesters have no desire to interfere with the draft, but because it has seemed obvious that the destruction of an individual's draft card could have no tangible obstructive effect.

[95] 391 U.S. at 379.

[96] *Id.*

[97] *See* note 84 *supra.*

[98] 391 U.S. at 379-80.

[99] "We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies." *Id.* at 381.

symbolic speech activity and the conduct evil that Congress may regulate. The Court espoused that "When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest."[100]

The Court asserted that O'Brien was convicted solely for his conduct and not for his speech activity.[101] The Court was careful to distinguish *O'Brien* from cases "where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful."[102]

Although a law that restricts speech based solely on the government's disagreement with or dislike for the speech would violate constitutional principles of content neutrality,[103] absence of governmental animus does nothing to protect the rights of a speaker such as O'Brien. As long as a government asserts and a reviewing court accepts a legitimate content-neutral purpose for the law, a plaintiff will be precluded from any effective protection for his right to speak in the manner he chooses.[104] The Court's unwillingness to inquire into the Congressional motive for passing the law in *O'Brien*[105] suggests that once a court defers to the legislative statement of a conduct-related, content-neutral purpose for the law, the court's review role is completed. The more deference a court shows to a legislative finding of

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[100] *Id.* at 382.

[101] "In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct. . . . For [the] noncommunicative impact of his conduct, and for nothing else, he was convicted." *Id.* at 381-82.

[102] *Id.* at 382 (citing Stromberg v. California, 283 U.S. 359 (1931)).

[103] The "content neutrality" rule essentially means that a government may not restrict or punish speech based solely on disagreement with or hostility to the content of a given communication. For a discussion of this principle, see Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981-82); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983-84).

[104] "[B]oth the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System." 391 U.S. at 381-82.

[105] "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.* at 383.

simultaneity between conduct evil and speech, the more likely a court will uphold the statute and its incidental restrictions on the rights of speakers. To whatever extent the Court is willing to accept a legislative finding regarding the nexus between conduct evil and speech, as a function of separation of powers and federalism,[106] the result will be a diminution of the protections available to those wishing to disseminate their views.

C. *Young v. American Mini Theatres*

In *Young v. American Mini Theatres*,[107] the legislative assertion of a nexus between regulable conduct evil and speech is certainly more tenuous than in *O'Brien*.[108] An important question to consider in the context of *Young* is whether the *O'Brien* balancing approach is an appropriate method of analysis, based on the nature of the legislative findings accepted by the Court as justification for the ordinance in question. In *Young*,[109] the Court examined the issue of whether zoning ordinances that the Detroit Common Council had passed were unconstitutional because they were based on the content of movies protected by the first amendment. Instead of concentrating "adult" theaters in limited zones,[110] the Detroit ordinances required that such theaters be dispersed a certain distance from residential areas or other regulated uses.[111] An important aspect of the Detroit reg-

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[106] For the position that the normal deference a court shows to a legislature should not apply in first amendment cases, see Linde, *supra* note 12, at 1181:

> In judicial review of legislation not affected by the first amendment, deference to the factual assumptions presumed to underlie the legislative prescription, no matter how fictitious or anachronistic those assumptions are, rightly reflects the constitutional allocation of power. But such conventions of limited judicial review are inappropriate to first amendment cases. If present danger is to be a prerequisite to punishing speech, there is no room for deference to a past legislative assessment of danger.

[107] 427 U.S. 50 (1976).

[108] *See* notes 114-16 *infra* and accompanying text.

[109] 427 U.S. at 50.

[110] For a case that upheld the validity of city zoning ordinances that had the effect of requiring all adult motion picture theaters, as defined in the ordinances, to be located in certain downtown areas, see Northend Cinema, Inc. v. Seattle, 585 P.2d 1153 (1978), *cert. denied*, 441 U.S. 946 (1979).

[111] 427 U.S. at 52. See *id.* at n.3 for a discussion of regulated uses.

ulatory scheme was that the classification of a theater as "adult" was based on the character of the movies it exhibits.[112]

For purposes of the separation of powers and federalism analysis, one must note that a city council, not Congress or a state legislature, made the findings that support the zoning ordinance that incidentally restricts freedom of speech.[113] One must focus on the conduct evil addressed by the Detroit Common Council, including the questions of who engages in the conduct evil, and whether it occurs simultaneously with the speech or flows from the speech at some time after the speech activity has begun.

The 1972 ordinances requiring the dispersal of adult theaters were amendments to an "Anti-Skid Row Ordinance" which the Council had originally adopted in 1962.[114] "At that time the Detroit Common Council made a finding that some uses of property are especially injurious to a neighborhood when they are concentrated in limited areas."[115] Articulating the rationale

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[112] *Id.* at 53.

[113] For a discussion of reasons why a reviewing court should not show great deference to a legislative finding connecting speech activity and substantive evil, see generally Linde, *supra* note 12, at 1179-82. Specifically, Professor Linde contends:

> It is unrealistic to sustain laws directed in terms against expression on the basis of deference to a greater capacity of the legislative than the judicial process to assess the danger of the proscribed expression. Most laws are not a one-time solution to an immediate problem; most are, in terms, permanent. The most conscientious legislation is at best a diagnosis made today and a prescription for the indefinite future. . . . But unlike adjudication (by court or agency), the legislative process requires no obligatory link between the lawmakers' decision and the factual premises. . . . But even if the legislative findings which are given deference are the true premises of the legislative action, for what length of time can such findings provide the predicate of "danger," if that is constitutionally required? Are the laws that were sustained 10 years ago by deference to congressional findings of 20 years ago still constitutional today? And when we turn from Congress to state legislatures and city councils, the premise of superior capacity to predict future danger from the content of speech or press becomes even more attenuated.

Id. at 1180.

[114] 427 U.S. at 54.

[115] *Id.* The ordinance provided in part:

> In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as

proffered by the Common Council for the dispersal of adult theaters, the Court stated:

> In the opinion of the urban planners and real estate experts who supported the ordinances, the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.[116]

Discussing Detroit's interest in preserving the character of its neighborhoods, Justice Stevens[117] espoused a very deferential role for the Court in scrutinizing the findings of the Common Council:

> It is not our function to appraise the wisdom of [the Common Council's] decision to require adult theaters to be separated rather than concentrated in the same areas . . . . [T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect.[118]

Because the Court was dealing with a zoning ordinance,[119] it relied on separation of powers and federalism[120] principles to

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> having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood.

Id. at n.6.

[116] *Id.* at 55.

[117] This discussion is in Part III of Justice Stevens' opinion. Only Chief Justice Burger and Justices White and Rehnquist joined Part III.

[118] 427 U.S. at 71.

[119] Since Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Court has applied a very deferential standard in its review of zoning laws, requiring only that the law have a rational relationship to a permissible state objective.

[120] " . . . [T]he record discloses a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect. It is not our function to appraise the wisdom of its decision to require adult theatres to be separated rather than concentrated in the same areas . . . ." 427 U.S. at 71.

apply rational basis scrutiny to the ordinances.[121] The Court adopted a level of judicial scrutiny which allowed the city of Detroit great leeway in determining how to go about "preserving the character of its neighborhoods."[122] The Court accepted the contention of the Common Council that a causal connection existed between the concentration of adult theaters and the deterioration of the surrounding neighborhoods.[123] Thus, the Court accepted the council's argument that a one-hundred percent correlation existed between the speech activity and the conduct evil that the council tried to prevent.[124] In this sense, the Court's analysis is the same as that of the four-part *O'Brien* balancing test.[125]

Justice Powell, concurring in *Young*, analyzed that *Young* "present[s] an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent."[126] He concluded that it was appropriate to analyze the council's action under the four-part test of *United States v. O'Brien*.[127] Justice Powell contended that "[t]he factual distinctions between a prosecution for destruction of a Selective Service registration certificate, as in *O'Brien*, and . . . [the facts of *Young*] are substantial, but the essential weighing and balancing of competing interests are the same."[128]

After characterizing the case as involving primarily a land-use regulation,[129] Justice Powell stated that "the legislative judgment is to control in cases in which the validity of a particular zoning regulation is 'fairly debatable.' "[130] He agreed with Justice Stevens that "the Council was motivated by its perception

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[121] "Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.*

[122] *Id.*

[123] *Id.* "The Common Council's determination was that of a concentration of 'adult' movie theatres causes the area to deteriorate and become a focus of crime, effects which are not attributable to theatres showing other types of films." *Id.* at n.34.

[124] *Id.* at 73.

[125] *See* note 72 *supra* and accompanying text.

[126] 427 U.S. at 73.

[127] *Id.* at 79.

[128] *Id.* at 80.

[129] *Id.* at 73.

[130] *Id.* at 74.

that the 'regulated uses,' when concentrated, worked a 'deleterious effect upon the adjacent area' and could 'contribute to the blighting or downgrading of the surrounding neighborhood.' "[131] He asserted that the zoning ordinance challenged in *Young* "resulted directly from the Common Council's determination that the recent proliferation of these establishments and their tendency to cluster in certain parts of the city would have the adverse effect upon the surrounding areas that the ordinance was aimed at preventing."[132]

Characterizing *Young* as a case of first impression before the Supreme Court,[133] Justice Powell insisted that "this situation is not analogous to cases involving expression in public forums or to those involving individual expression or, indeed, to any other prior case."[134] To evaluate his claim that *Young* is distinguishable from all other cases, one must look closely at the first amendment issues that he identified in *Young*. Justice Powell's primary concern was "that there be full opportunity for expression in all of its varied forms to convey a desired message."[135] His secondary concern was "that there be full opportunity for everyone to receive the message."[136]

A potentially serious defect lurks in Justice Powell's definitional system. While defining the first amendment interests as encompassing both a right to disseminate and a right to receive the message, he shifted his level of abstraction from the group to the individual level. Discussing the rights of movie theater owners, he spoke of the marketplace in general terms, ignoring the individual interests of specific theater owners.[137] Although it

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[131] *Id.* at 74-75.

[132] *Id.* at 75.

[133] "This is the first case in this Court in which the interests in free expression protected by the First and Fourteenth Amendments have been implicated by a municipality's commercial zoning ordinances." *Id.* at 76.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] In this case, there is no indication that the application of the Anti-Skid Row Ordinance to adult theatres has the effect of suppressing production of or, to any significant degree, restricting access to adult movies. The Nortown [theatre] concededly will not be able to exhibit adult movies at its present location, and the ordinance limits the potential location of the proposed

may be true that, in relation to the market as a whole, "Detroit has silenced no message, has invoked no censorship,"[138] it cannot be contended that the first amendment rights of the individual theater owners are protected under the ordinance. When Justice Powell refered to "the opportunity for a message to reach an audience,"[139] one must question what is being protected—the message or the speaker? If the first amendment protects only the message, as Justice Powell seemed to argue, then the rights of an individual speaker may be abridged, as long as other speakers comprise a judicially-defined marketplace of acceptable size. It does not help to tell individual speakers who are silenced that constitutional protections are observed because other speakers have the right to disseminate their messages.[140] Although there is no "significant *overall* curtailment of adult movie presentations, or the opportunity for a message to reach an audience,"[141] the ability of an individual speaker to communicate is not protected. Justice Powell contended, however, that "some prospective patrons may be inconvenienced by this dispersal. But other patrons, depending upon where they live or work, may find it more convenient to view an adult movie when adult theaters are not concentrated in a particular section of the city."[142]

The interests of viewers in general, or of one viewer in particular, may be protected under the dispersal program in a way that the interests of speakers cannot. While viewers' access to the offered materials is not diminished, the access of a particular theater owner to potential customers certainly is.

Pussy Cat [theater].

Id. at 77-78.

[138] *Id.*

[139] *Id.* at 79.

[140] Justice Stewart makes the same point in his dissent:

> The Court stresses that Detroit's content-based regulatory system does not preclude altogether the display of sexually oriented films. But, as the Court noted in a similar context in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), . . . this is constitutionally irrelevant, for "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

Id. at 86 n.6.

[141] *Id.* (emphasis added).

[142] *Id.*

Thus defining the first amendment interests, Justice Powell concluded that, "[i]n these circumstances, it is appropriate to analyze the permissibility of Detroit's action under the four-part test of *United States v. O'Brien*."[143] In considering the appropriateness of applying the *O'Brien* test to the facts of *Young*, one should ask whether Justice Powell was more correct when he said that *Young* "is not analogous . . . to any other prior case."[144] Looking at the facts of the two cases, there is a strong argument that *Young* is sufficiently distinguishable from *O'Brien* to preclude analysis of the Detroit zoning ordinances under the four-part *O'Brien* balancing test.

In each case, the legislature established that the conduct evil would always happen upon the occurrence of the speech activity.[145] In *O'Brien*, Congress concluded that destruction of a draft card automatically frustrated the purposes of the Selective Service Act amendment under which the defendant was prosecuted.[146] Congress posited, and the Court accepted, simultaneity of occurrence of the speech activity and the conduct evil. In *Young*, the Common Council determined that the deterioration of neighborhoods always followed the clustering of adult movie theaters.[147] As in *O'Brien*, the legislature removed any doubt about the conduct evil attending the speech activity.[148] Unlike *O'Brien*, however, the Common Council did not assert that there existed a simultaneous occurrence of the speech activity and the conduct evil. Rather, the legislature asserted an inevitability of the conduct evil occurring once the particular speech activity occurred.[149]

In *O'Brien* there was no time gap between the symbolic speech activity and the frustration of the purposes of the Selective Service System. With no time gap, and therefore no doubt

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[143] *Id.*

[144] *Id.* at 76.

[145] *See* notes 146 and 149 *infra*.

[146] For a discussion of the governmental purposes offered in support of the federal statute in *O'Brien*, see notes 85-100 *supra* and accompanying text.

[147] 427 U.S. at 74-75.

[148] *See* note 87 *supra*.

[149] As Justice Powell asserted in his concurrence in *Young*: "Those amendments resulted directly from the Common Council's determination that the recent proliferation of these establishments and their tendency to cluster in certain parts of the city would have the adverse effect upon the surrounding areas that the ordinance was aimed at preventing." 427 U.S. at 75.

as to the occurence of the conduct evil, it does not make sense to employ the clear and present danger test as the method of analysis.[150] A clear and present danger analysis is not indicated by the facts of *O'Brien* because the "presentness" element of the test, dealing with imminency of conduct evil in relation to speech,[151] is compressed to the point of simultaneity. It makes no sense to talk about how quickly conduct follows speech if the legislature has conclusively determined that the speech activity and the conduct evil happen at the same time.[152]

A major distinction between *O'Brien* and *Young* is the party who actually engages in the conduct evil. Identifying the evildoer is important when considering the accuracy of the legislative determination that the regulable conduct evil always accompanies the speech activity. In *O'Brien*,[153] the speaker himself, by way of his symbolic speech activity, engaged in the conduct evil of frustrating the purposes of the Selective Service System.[154] Because O'Brien himself engaged in the conduct evil at the same time he was communicating, the nexus between his speech activity and the regulable conduct evil is obvious and direct. In *Young*, however, it is not the theater owners who engage in the criminal activity or ruination of neighborhoods. Rather, it is some other group allegedly attracted to a collection of adult movie theaters.[155] As soon as it is argued that it is not the speaker who engages in the conduct evil, but some group that does not even necessarily patronize the adult movie theaters, there is a less direct connection between the regulated speech activity and the conduct evil. The fact that someone other than the speaker engages in the regulable conduct evil makes it more difficult for the legislature to establish a sufficiently high correlation between the speech and the conduct evil.

A majority in *Young* ignored these differences and emphasized instead the power of the Detroit Common Council to

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[150] For a discussion of this point, see notes 37-43 *supra* and accompanying text.

[151] For a discussion of the clear and present danger test, see Linde, *supra* note 12; Redish, *supra* note 50; Strong, *supra* note 48.

[152] *See* notes 13-35 *supra* and accompanying text.

[153] See notes 38 and 43 *supra* for a discussion of the concept of "symbolic speech."

[154] *See* notes 83-100 *supra* and accompanying text.

[155] 427 U.S. at 55.

regulate the speech activity under the guise of land-use regulation.[156]

The dissenters,[157] however, were aware of the difficulties inherent in accepting the legislative removal of the contingency between the regulated speech activity and the conduct evil. Justice Stewart, in his dissent,[158] argued that *Young* involved "the constitutional permissibility of selective interference with protected speech[159] *whose content is thought to produce distasteful effects.*"[160] The operative question is how convincingly the Detroit Common Council demonstrated the causal connection between the kind of speech regulated and the "distasteful effects." Justice Blackmun, in his dissent,[161] argued that for reasons of vagueness and overbreadth,[162] the Detroit ordinance did not es-

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[156] Justice Stevens delivered the opinion of the Court in *Young*. Chief Justice Burger and Justices White and Rehnquist joined his opinion *in toto*. Justice Powell concurred in Parts I and II but wrote separately to express his disagreement with Part III of Justice Stevens' opinion and to clarify his approach to the case.

[157] Justice Stewart dissented in *Young*, joined by Justices Brennan, Marshall, and Blackmun. Justice Blackmun also dissented, joined by Justices Brennan, Stewart, and Marshall.

[158] 427 U.S. at 84.

[159] *See id.* at 85 n.3 (citing American Mini-Theatres, Inc. v. Gribbs, 518 F.2d 1014, 1019 (1975) (no regulatory provision for judicial determination of obscenity, therefore the material must be presumed to be protected by the first amendment)).

[160] *Id.* at 85 (emphasis added).

[161] *Id.* at 88.

[162] For an excellent discussion of the difference between the vagueness and overbreadth doctrines, see M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.11[E] (1984):

> In a number of decisions the Supreme Court has used the terms "vagueness" and "overbreadth" interchangeably, or otherwise treated the terms as if they referred to the same concept. In its more carefully reasoned opinions, however, the Court has recognized the very different concepts that the two terms encompass. *Zwickler v. Koota*, [389 U.S. 241 (1967)], for example, makes the point that a statute is void for vagueness if it " 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . .' " On the other hand, a statute may be defective for overbreadth although it is "lacking [in] neither clarity nor precision. . . ." It may, nevertheless be "void for 'overbreadth,' . . . [in] that it offends the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' "

tablish the requisite nexus between the kind of speech activity sought to be regulated and the conduct evil which the legislature has a right to prevent. He contended that the ordinance was intrinsically vague because the presence of sufficiently clustered regulated uses cannot be determined with any degree of certainty.[163] The first question in analyzing a statute as unconstitutionally vague is whether it contains sufficiently precise standards to apprise a person that he may be subject to the regulatory impact of the statute.[164] Justice Blackmun made a compelling case that a theater owner is not adequately put on notice of when his theater is being used for presenting[165] movies that are "distinguished or characterized by an emphasis on"[166] certain, statutorily-defined sexual activities or anatomical areas.[167] In addition, to avoid being within 1,000 feet of another regulated use, a theater owner must continually apply the statutory definitions to himself and his neighbors. As Justice Blackmun asserted: "At any moment [a theater owner] could become a violator of the ordinance because some neighbor has slipped into a 'regulated use' classification."[168] The second aspect of the vagueness problem "is the tendency of vague statutory standards to grant excessive and effectively unreviewable discre-

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[163] 427 U.S. at 89-90.

[164] In Smith v. Goguen, 415 U.S. 566 (1974), Justice Powell, writing for the Court, explained that the "void for vagueness" doctrine "incorporates the notions of fair notice or warning. . . . It requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' " *Id.* at 572-73.

[165] 427 U.S. at 89.

[166] *Id.*

[167] *Id.*

[168] *Id.* In addition, Justice Blackmun comments:

> He must know, for example, if the adjacent hotel has opened a bar or shoeshine "parlor" on the premises, though he may still be uncertain whether the hotel as a whole constitutes more than one "regulated use." He must also know the moment when the stock in trade of neighboring bookstores and theatres comes to be of such a character, and predominance, as to render them "adult." Lest he let down his guard, he should remember that if he miscalculates on any of these issues, he may pay a fine or go to jail.

Id.

tion to the officials who enforce those standards."[169] After detailing the licensing procedures mandated by the Detroit ordinance,[170] Justice Blackmun argued that the licensing scheme, in its vagueness and overbreadth,[171] constituted a prior restraint on the speech activities of individual theater owners.[172]

Justice Blackmun's dissent may be characterized as objecting to the definitional system inherent in the Detroit ordinance because it failed to establish, with sufficient clarity, the conditions under which the regulable conduct evil may occur.[173] The Detroit Common Council's assertion of a nexus between a certain kind of speech activity and a regulable conduct evil depends on the accurate, narrow definition of the precedent factual conditions necessary for creation of the conduct evil. If a theater owner cannot tell when he or his neighbor is operating a "regulated use," how can he tell when two of the "regulated uses" are within a certain distance of each other?

Given the definitional problems alone, there are serious problems in the argument that the Detroit Common Council established a high enough correlation between the occurrence of a certain kind of speech activity and a regulable conduct evil. At least in *O'Brien*, where the speaker himself created the conduct evil when he burned his draft card, the legislature was able to identify a certain speech activity that directly impaired the draft system.[174] In *Young*, even though it may have been possible to define the speech that resulted in the regulable conduct evil, the statute did not provide for an acceptable method of determining when regulated uses existed, let alone when they were sufficiently clustered to create the presumption of causing the deterioration of surrounding neighborhoods.[175]

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[169] *Id.* at 91.

[170] *Id.* at 91-94.

[171] See note 162 *supra* for definitions of vagueness and overbreadth.

[172] 427 U.S. at 91 n.4 (power of city officials to grant or deny licenses or waive the 1000-foot rule constituted prior restraint and the ordinance was subject to challenge on that ground alone).

[173] *See id.* at 89-90.

[174] *See* note 154 *supra*.

[175] *See* 427 U.S. at 89-90.

Considering the factual and analytical differences between *O'Brien* and *Young*,[176] one must ask why a majority of the Court showed such deference to the findings of the Detroit Common Council that the clustering of "regulated uses" necessarily results in the deterioration of neighborhoods. The answer, in large part, must lie in notions of separation of powers and federalism.[177] Characterizing the Detroit ordinance as simply a zoning or land-use regulation,[178] the Court showed its usual deference to local ordinances or statutes that regulate in these areas.[179] According to Justice Powell, the theater owners' attack on the Detroit ordinance focused on the argument "that it is the 'character of the right, not of the limitation' which governs the standard of judicial review . . . and that zoning regulations therefore have no talismanic immunity from constitutional challenge."[180] Justice Powell and the majority rejected this argument and accorded primary significance to the nature of the limitation as a zoning or land-use regulation.[181] The free speech interests of individual theater owners clearly were superseded by the police power interests of the City of Detroit in maintaining the quality of its neighborhoods. As Justice Blackmun argued in his dissent:

> This may be a permissible way to control pawnshops, pool halls, and the other "regulated uses" for which the ordinance was originally designed. It is not an acceptable way, in the

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[176] See notes 153-62 *supra* and accompanying text for a general discussion of the differences between these cases.

[177] Chief Justice Burger, writing for the Court in *TVA v. Hill* stated:

> Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While "[i]t is emphatically the province and duty of the judicial department to say what the law is," . . . it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.

437 U.S. 153, 194 (1978) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[178] *See* notes 114-21 *supra* and accompanying text.

[179] *See* note 119 *supra*.

[180] 427 U.S. at 75.

[181] *See id.* at 73-74 (Justice Powell) and 62-63 (majority).

> light of the First Amendment's presence, to decide who will be permitted to exhibit what films in what places.[182]

Despite whatever intrinsic merit Justice Blackmun's argument might have, it was soundly rejected by the Supreme Court in *Renton v. Playtime Theatres, Inc.*[183]

In *Renton*, the Court, through Justice Rehnquist,[184] rejected a constitutional challenge to a zoning ordinance passed by the City of Renton, Washington. "[The ordinance] prohibits adult motion picture theaters[185] from locating within 1,000 feet of any residential zone, single or multiple family dwelling, church, park, or school."[186]

Relying strongly on *Young v. American Mini-Theatres*,[187] the Court concluded that, although the Renton ordinance only affects theaters that show adult motion pictures, it was constitutional because its primary focus "is aimed not at the *content* of the films shown at 'adult motion picture theaters,' but rather at the *secondary effects* of such theaters on the surrounding community."[188]

The *"secondary effects"* of concentrating adult movie theaters were the same as those identified in *Young*: an increase in crime, a decrease in the city's retail trade, a decrease in property values, and a general deterioration of the quality of urban life.[189]

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[182] *Id.* at 94.

[183] 106 S. Ct. 925 (1986).

[184] Justice Rehnquist delivered the opinion of the Court, joined by Chief Justice Burger, and Justices White, Powell, Stevens, and O'Connor. Justice Blackmun concurred separately. Justice Brennan dissented, joined by Justice Marshall.

[185] The Court found no vagueness problems with the City of Renton's definition of "adult motion picture theater":

> The term "adult motion picture theater" was defined as "[a]n enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characteri[zed] by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' . . . for observation by patrons therein."

106 S. Ct. at 927.

[186] 106 S. Ct. at 926.

[187] *See* notes 107-82 *supra* and accompanying text.

[188] 106 S. Ct. at 929 (emphasis in original).

[189] *Id. Cf.* note 116 *supra* and accompanying text.

These are the substantive "non-speech" evils that the Renton City Council identified as accompanying the concentration of adult movie theaters near the regulated uses listed in the ordinance.

The important question in this case is how the Renton City Council established the nexus between the concentration of adult movie theaters and the substantive evils it wished to prevent. It must be emphasized that the Renton ordinance was enacted without the benefit of any studies specifically relating to the particular problems or needs of Renton.[190] Rather, "Renton relied heavily on the experience of, and studies produced by, the City of Seattle."[191]

In upholding this method of establishing causality between regulated speech and substantive evil, the Court said:

> We hold that Renton was entitled to rely on the experiences of Seattle and other cities . . . in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.[192]

Justice Brennan took strong exception to the method of regulation approved by the majority:

> The Court's approach largely immunizes such measures from judicial scrutiny, since a municipality can readily find other

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[190] *Id.* The court of appeals found that Renton's interests in the ordinance were "conclusory and speculative" because the "ordinance was enacted without the benefit of studies relating to" the particular problems or needs of Renton. *Id.* (citing 748 F.2d at 537).

[191] *Id.* "In Seattle, as in Renton, the adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood." *Id.* (citing Northend Cinema, Inc. v. Seattle, 585 P.2d 1153 (Wash. S. Ct. 1978)).

[192] 106 U.S. at 931.

> municipal ordinances to rely upon, thus always retrospectively justifying special zoning regulations for adult theaters.[193]

Justice Brennan's point is well taken. The fact remains that a zoning ordinance such as Renton's does affect speech in an important way and to a significant degree. The majority purports to protect those speech interests by applying "time, place, and manner" standards to the ordinance in question.[194]

One of the requirements for a valid "time, place, or manner" regulation is that it serve a "substantial governmental interest."[195] This is an absolutely specious requirement if cities are able to rely on "evidence" from other locations that they reasonably believe is relevant to the prevention of the substantive evil the city is trying to prevent. The majority has created a free-floating justification for any city that wishes to pass a zoning ordinance that is based, at least in part, on the content of the speech regulated.

Renton reflects an ever-increasing deference by the Court to zoning ordinances that regulate on the basis of the content of speech. The Court's review role is now limited to determining whether a city council had a reasonable belief that conditions in some other location might be relevant to the city's problems of crime or property devaluation.

In the zoning area, the Court has made it extremely easy for a city council to establish the nexus between a certain kind of speech and regulable substantive evils. It is hard to imagine how a city council could fail to meet the "standards" set forth by the Court in *Renton*.

Moving into more general areas of speech regulation, this Article now examines the clear and present danger test, and its method of establishing the link between speech and substantive evil.

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[193] *Id.* at 936.

[194] *Id.* at 933.

[195] *Id.* at 928 (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); City Council v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981)).

III. CLEAR AND PRESENT DANGER TEST

A. Brandenburg v. Ohio[196]

In *Brandenburg*, the United States Supreme Court reversed the conviction of a Ku Klux Klan leader convicted under the Ohio Criminal Syndicalism statute for " 'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.' "[197] The problem with the statute was that it defined "the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action."[198] Basing its decision on the failure of the Ohio statute to draw this distinction,[199] the Court ruled:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[200]

A statute that does not incorporate these clear and present danger principles suffers from both first and fourteenth amendment problems.[201] At least in the context of advocacy of force or violence, the clear and present danger test provides standards which serve to notify potential speakers of what kind of speech is regulable,[202] and serves to guide the government authorities in the application of the statute.[203] Incorporation of these principles

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[196] 395 U.S. 444 (1969).

[197] *Id.* at 444-45 (citing OHIO REV. CODE ANN. § 2923.13 (Page 1953) (repealed 1974)).

[198] *Id.* at 448-49.

[199] "Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action." *Id.* at 449 n.4.

[200] *Id.* at 447.

[201] *Id.* at 448.

[202] *See* note 162 *supra* and accompanying text.

[203] *See* note 164 *supra* and accompanying text.

in a statute that attempts to regulate certain kinds of speech also avoids the overbreadth[204] problem of the statute "sweep[ing] within its condemnation speech which our Constitution has immunized from governmental control."[205]

Brandenburg represents the culmination of a long line of cases developing the clear and present danger test.[206] In his concurrence in *Brandenburg*, Justice Douglas sketched the evolution of clear and present danger from its inception in the Espionage Act cases of 1919.[207]

In the first of these cases, *Schenck v. United States*,[208] the Court sustained the conviction of a defendant charged with attempts to cause insubordination in the military and obstruction

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[204] Although a person charged with violation of a governmental restriction on speech has himself engaged in speech which is unprotected under the First Amendment, he may nevertheless assert as a defense the invalidity of the restriction if such restriction is sufficiently broad so as also to prohibit speech which is protected under the First Amendment. The restriction as applied to the given facts may be perfectly constitutional, but it is nevertheless "overbroad," or invalid "on its face," for the reason that its reach also extends to protected speech. In such circumstances the person charged with violation of the restriction has standing to assert the invalidity of the entire statute (or other restriction) notwithstanding the fact that his speech is not in itself constitutionally protected.

M. NIMMER, *supra* note 162, at § 4.11[A].

[205] 395 U.S. at 448.

[206] *See* Strong, *supra* note 48.

[207] In addition to *Schenck v. U.S.*, discussed *infra* at notes 208-27 and accompanying text, the Supreme Court decided two other Espionage Act cases in 1919:

> One week after writing the *Schenck* opinion Holmes wrote two other opinions for the Court affirming convictions in similar cases. In *Frohwerk v. United States*, 249 U.S. 204 (1919), he stated that: '[T]he First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. . . . Whatever might be thought of the other counts on the evidence, if it were before us, we have decided in *Schenck v. United States*, that a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion.' 249 U.S. at 206.

In *Debs v. United States*, 249 U.S. 211 (1919), Holmes affirmed the conviction of Eugene Debs, a prominent Socialist of the time, for allegedly encouraging listeners to obstruct the recruiting service. Holmes in this case spoke more in common law speech terms which were adopted later by the Court (but not by Holmes) in the . . . *Gitlow* case. . . .

J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 875 n.12 (2d ed. 1983).

[208] 249 U.S. 47 (1919).

of enlistment. Schenck distributed pamphlets that urged resistance to the draft, denounced conscription, and impugned the motives of those backing the war effort. In rejecting a First Amendment defense to the conviction, Justice Holmes articulated the following test:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[209]

The evils of causing insubordination in the military and obstructing enlistment in the armed forces are certainly evils which Congress may proscribe and punish under its power to raise and maintain armies.[210] The important issue in *Schenck* is how Congress attempted to establish the connection between the regulable conduct evils and any speech activity. The pertinent provisions of the Espionage Act of 1917[211] did not specifically mention any kind of language that was intrinsically evil or regulable. The statute itself only proscribed certain conduct evils, and the Court, through its formulation of the clear and present danger test, created the means of establishing the nexus between the speech activity and the statutorily proscribed conduct evil.[212] Congress

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[209] *Id.* at 52.

[210] U.S. CONST. art. I, § 8.

[211] The 1917 Espionage Act, presently codified at 18 U.S.C. § 2388 (1948), created three new offenses:

> [1] Whoever, when the United States is at war, willfully makes or conveys false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies; or [2] whoever, when the United States is at war, willfully causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States; or [3] willfully obstructs the recruiting or enlistment service of the United States, to the injury of the service or of the United States, or attempts to do so shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

[212] In *Gitlow v. New York*, 268 U.S. 652 (1925), Justice Sanford described the kind of statute at issue in *Schenck* as follows:

> It is clear that the question in such cases is entirely different from

did not establish any connection between those conduct evils and any specifically defined speech activity.[213] In order to uphold the convictions in *Schenck*,[214] the Court had to connect the speech activity of Schenck to the conduct evils proscribed by Congress. The clear and present danger test was the tool of statutory construction by which the Court could consider Schenck's speech to be the functional equivalent of a statutorily defined attempt to cause insubordination or obstruction of the recruiting or enlistment service of the armed forces.[215]

> that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection.

Id. at 670-71.

[213] *Id.*

[214] There is a strong argument that the political and military exigencies of a wartime situation affect how the Supreme Court deals with First Amendment claims:

> War and preparation for war create serious strains on a system of freedom of expression. Emotions run high, lowering the degree of rationality which is required to make such a system viable. It becomes more difficult to hold the rough give-and-take of controlled controversy within constructive bounds. Immediate events assume greater importance; long-range considerations are pushed to the background. The need for consensus appears more urgent in the context of dealing with hostile outsiders. Cleavage seems to be more dangerous, and dissent more difficult to distinguish from actual aid to the enemy. In this volatile area the constitutional guarantee of free and open discussion is put to its most severe test.
>
> It is not surprising, therefore, that throughout our history periods of war tension have been marked by serious infringements on freedom of expression. . . .

Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975 (1968).

[215] Justice Holmes had introduced the 'clear and present danger' test for unanimous Court in *Schenck v. United States*, which sustained a conviction under provisions of the Espionage Act of 1917 written in "nonspeech" terms. The violation charged to the "conspiracy" was the circulation of a leaflet which in "impassioned language" opposed the war and conscription and called upon draftees to 'assert their rights.' The defense argued that distributing the leaflet, even if it was both intended and likely to obstruct the successful execution of the draft, could not constitutionally be punished

It is important to note that in *Schenck*, as in other cases using a clear and present danger analysis,[216] the legislature has not established a conclusive nexus between the conduct evil and speech.[217] The medium of communication in *Schenck* was written speech. In cases involving written or oral speech[218] it is more difficult for a legislature to establish the nexus between conduct evil and speech than in a situation involving symbolic speech, where the action itself is the medium of expression.[219] Simply put, in many cases involving written or oral communication, the legislature cannot tell when a regulable conduct evil will attend a certain kind of speech activity and therefore cannot posit into the legislation a high enough correlation between the conduct evil and the speech to warrant a statutorily-defined, blanket regulation of the speech. The result of this legislative inability to remove the contingency between conduct evil and speech is that, if certain speech activity is to be regulated, the courts must establish a close enough link between the conduct evil and the speech to warrant the regulation of the speech on a case-by-case basis. The clear and present danger analysis is the primary method used by the courts.[220]

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as a violation of the Act. It was to meet this first amendment claim that Holmes coined what was to become known as the 'clear and present danger' test.

In *Schenck* the "proximity and degree" of danger had served as a constitutional measure to test when words alone could be found to qualify as the act that Congress had intended to prohibit.

Linde, *supra* note 12, at 1170-71.

[216] *See* notes 218-20 *infra*.

[217] "[A] clear and present danger test makes sense only on the premise that it may justify suppression of speech which, in the absence of the particular exigent circumstances, would indeed be privileged under the first amendment." Linde, *supra* note 12, at 1169.

[218] For an example of this principle in a case involving oral speech, see Debs v. United States, 249 U.S. 211 (1919). In *Debs*, the Court sustained the conviction of a prominent socialist, Eugene V. Debs. During a speech on socialism and opposition to the war, Debs praised draft resisters, saying, "You need to know that you are fit for something better than slavery and common fodder." *Id.* at 214. The Supreme Court affirmed his conviction because the jury could find that his remarks had a tendency to obstruct recruiting, and that Debs had that intent.

[219] See the discussion of *United States v. O'Brien* at notes 60-106 *supra* and accompanying text.

[220] The clear and present danger test may manifest itself in different forms, but the

Applying the clear and present danger test to different fact situations, a court will consider a number of different elements to determine whether the activity of the speaker bears a sufficiently close relation to the conduct evil regulable by the legislature. Under the *Schenck* formulation of the clear and present danger test,[221] courts will consider the context surrounding the speech,[222] the nature of the speech,[223] whether there exists a high probability of the conduct evil following the speech,[224] the degree of imminency that exists between the occurrence of the speech and the happening of the conduct evil,[225] and whether the legislature

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analysis remains essentially the same. For example, in *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969), the Supreme Court dealt with a situation in which high school and junior high school students wore black armbands to school to protest the war in Vietnam. The school board adopted a policy requiring the suspension of any student at school with an armband. The suspension would stay in effect until the student returned without an armband. In setting forth the test for a majority of the Court, Justice Fortas said "[c]ertainly where there is no finding and no showing that engaging in of the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (1966)).

[221] *See* note 209 *supra* and accompanying text.

[222] For a discussion of the effect of war on the protections afforded by the First Amendment, see note 214 *supra*.

[223] The United States Supreme Court traditionally has recognized a difference of constitutional magnitude between advocacy of ideas and incitement to action. *See* Yates v. United States, 354 U.S. 298, 320 (1957).

[224] The Court in *Yates*, employed a calculus in analyzing whether a particular utterance is protected by the First Amendment. In discussing the permissibility of punishing speech that advocates future violent action, the Court said:

> The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence 'as a rule or principle of action,' and employing 'language of incitement,' . . . is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur.

Id. at 321 (quoting Dennis v. United States, 341 U.S. 494, 511-12 (1951)).

[225] Elevated to constitutional level, the danger test, retaining much of its original evidentiary flavor, became a device whereby, for legislation to pass constitutional muster, it must be demonstrated that a permissible objective of government is imminently and substantially threatened. Permissible objectives were identified without analysis as "certain substantive evils" with respect to which government possessed some authority. Yet by the new test government was empowered to take action only on proof of the immediacy

has a right to regulate the conduct evil addressed by the statute.[226] In operation, courts will consider these factors[227] to determine whether the particular speech is related closely enough to some conduct evil so that a legislature may incidentally impinge upon the rights of a speaker when attempting to prevent the occurrence of the conduct. When a legislature cannot prospectively determine that a regulable conduct evil will always attend a certain speech activity, the courts must do so on an individualized basis.

B. Dennis v. United States

This same analysis is reflected in the formulation of the clear and present danger test used by Chief Justice Vinson in *Dennis v. United States*.[228] In *Dennis*, the Court sustained conspiracy convictions under the Smith Act.[229] The defendants were charged with conspiring to organize the Communist Party of the United

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of serious peril to one or more of those substantive evils.

Strong, *supra* note 48, at 46.

[226] Besides . . . special classes of words which cause present injury, the normal law punished speech as an attempt or solicitation, although it falls short of actual injury; but . . . this is only when the words come somewhere near success and render the commission of actual crime or other tangible obstruction of state activities probable unless the state steps in at once and penalizes the conduct before it ripens into injury. The law of attempts and solicitation is directed not against the words but against acts, and the words are punished only because that is the necessary way to avoid harmful acts.

Z. CHAFEE, *supra* note 43, at 152.

[227] Professor Linde set forth a different list of elements inherent in a clear and present danger analysis:

> Four elements of analysis emerge: (1) the substantive content of the message—advocacy of concrete unlawful action as distinguished from advocacy of unlawful action as a principle; (2) the tenor of the message—advocacy in terms 'reasonably and ordinarily calculated to incite' the audience to take the action advocated; (3) the advocate's state of mind—the specific intent to see the unlawful action carried out, or to participate in an organization for that specific purpose; and (4) the objective conditions in which the advocacy occurs—the 'danger.'

Linde, *supra* note 12, at 1166-67.

[228] 341 U.S. 494 (1951).

[229] *See id.* at 495-98, citing to 18 U.S.C. § 11 (1946). The modified Act is now codified at 18 U.S.C. § 2385 (1970).

States, a society which teaches and advocates the overthrow and destruction of the United States by force or violence.[230]

In assessing the constitutionality of the Smith Act convictions, Chief Justice Vinson[231] adopted Judge Learned Hand's[232] interpretation of the clear and present danger test: "In each case courts must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[233] Chief Justice Vinson preferred this test, at least in part, because "it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances."[234] By "relating the significances"[235] of the factors in a free speech case, the *Dennis* standard implies a three part balancing test. First, one must identify the evil the legislature is trying to regulate and ascribe an appropriate gravity to that evil.[236] Second, the gravity of the evil must be discounted by its improbability, including the *Schenck* elements of certainty, imminency, and circumstances.[237] Finally, the discounted evil must be balanced against the invasion of free speech interests to determine whether the impingement of the right is justified by the seriousness of the discounted evil.[238]

Because of its focus on the net gravity of the evil being regulated, the *Dennis* version of the clear and present danger test is very similar to the four-part balancing test of *O'Brien*.[239] Once the legislative determination that a definable conduct evil always attends a certain kind of speech is accepted by a court, the *Dennis* clear and present danger test collapses into an *O'Brien* analysis.

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[230] 341 U.S. at 497-99.

[231] Chief Justice Vinson's opinion was joined by Justices Reed, Burton, and Minton. Justices Frankfurter and Jackson concurred in the judgment, each writing a separate opinion.

[232] United States v. Dennis, 183 F.2d 201, 212 (2nd Cir. 1950).

[233] 341 U.S. at 510.

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *See* note 72 *supra* and accompanying text.

Dennis is indistinguishable from *O'Brien* because the legislature established a one-hundred percent probability of the conduct evil attending the speech. Under the *Dennis* test, therefore, the improbability is zero and the evil regulated by the statute is not discounted at all but simply balanced against the speech interests involved. Once the Court embarks on a balancing process, the elimination of any discounting factors increases the number of cases in which the balance may tip in favor of state or municipal regulation of speech activity.

C. *New York v. Ferber*

The balancing process developed in *Dennis* was reflected in *New York v. Ferber*,[240] when the Supreme Court held that child pornography was outside the protection of the First Amendment.[241] In *Ferber*, the Supreme Court unanimously rejected a First Amendment attack on a New York law[242] designed to deal with the problem of child pornography. At issue was a state criminal statute that prohibited persons from knowingly promoting sexual performances by children under the age of sixteen by distributing material which depicts such performances.[243]

Ferber, the owner of a Manhattan store specializing in sexually oriented products, sold two films to an undercover police officer. The films were devoted almost exclusively to depiction of young boys masturbating. Ferber was convicted of two counts of promoting a sexual performance by a child with knowledge of the character and content of the films sold to the police.[244] The New York Court of Appeals reversed Ferber's convictions,

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[240] 458 U.S. 747 (1982).

[241] *Id.* at 763-64.

[242] N.Y. PENAL LAW §§ 263.00, 263.10, 263.15 (McKinney 1980).

[243] 458 U.S. at 749.

[244] The following §§ of the New York Penal Law were at issue in *Ferber*:

> "A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age." § 263.15.

To "promote" is also defined:

> " 'Promote' means to procure, manufacture, issue, sell, give, provide, lend, mail,

holding that the statute violated the first amendment.[245] The United States Supreme Court reversed and remanded, holding that the New York statute, as applied to Ferber, did not violate the first amendment.[246]

It should be noted that the statute under which Ferber was convicted[247] did not require proof that the films were obscene under traditional first amendment standards.[248] After characterizing the governmental objective of the statute as the prevention of sexual exploitation and abuse of children who are made to engage in sexual conduct for commercial purposes,[249] the Court explained that the obscenity test from *Miller v. California*[250] was not applicable to enable a state to pursue its constitutionally acceptable objective of prosecuting those who promote the sexual exploitation of children.[251] It is important to consider the foundation upon which the Court concluded that the *Miller* standards were inapposite to the constitutionality of the New York statute.

The Court was quick to endorse the legislative findings regarding the "proliferation of exploitation of children as subjects in sexual performances."[252] Citing the virtual unanimity of fed-

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deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same." § 263.00(5).

A companion provision bans only the knowing dissemination of obscene material. § 263.10.

Id. at 751.

[245] *Id.* at 752.

[246] *Id.* at 774.

[247] N.Y. PENAL LAW § 263.15.

[248] 458 U.S. at 752.

[249] *Id.* at 753, 757.

[250] 413 U.S. 15 (1973).

[251] 458 U.S. at 761. *See also* Justice O'Connor's concurring opinion, *id.* at 774-75. For a different view of the relevance of the *Miller* obscenity test, see the concurring opinion of Justice Brennan, joined by Justice Marshall, *id.* at 775-77.

[252] The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying passage of the New York laws reflect this concern:

> [T]here has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual per-

eral and state governments in condemning and regulating child pornography, as well as relevant literature to the same effect,[253] the Court declared that it would not second-guess the legislative judgment of New York.[254] As Justice White asserted for the majority: "That judgment, we think, easily passes muster under the first amendment."[255] One must ask precisely what Justice White meant when he concluded that the New York legislative judgment passed muster under the first amendment. Is it constitutionally dispositive that all or most states and the federal government agree that there is a proliferating evil of child pornography? Is there sufficient empirical proof to establish the harm that occurs to children from acting in sexually explicit films? Or, in *Ferber*, did the majority simply rationalize an intuitive agreement with the legislative action?[256] In any event, the majority opinion seems to indicate that some legislative judgments will provide an acceptable basis for regulating speech where others will not.[257] Clearly, at least part of the reason the Court found a sufficiently sound constitutional basis for the statute was the prevalent nationwide belief that child pornography is a serious problem.[258]

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formances.

Id. at 757 (quoting 1977 N.Y. Laws, ch. 910, § 1).

[253] 458 U.S. at 758 n.9.

[254] *Id.* at 758.

[255] *Id.*

[256] The concept of judicial bias as an element of the decisionmaking process is not new. "The truth is that the major premise of most of the great decisions of the Supreme Court is a concealed bias of some some—a highly laudable bias perhaps, yet a bias." Corwin, *The Supreme Court and Unconstitutional Acts of Congress*, 4 MICH. L. REV. 616, 625 (1906).

[257] 458 U.S. at 755.

[258] In recent years, the exploitive use of children in the production of pornography has become a serious national problem. The Federal Government and 47 States have sought to combat the problem with statutes specifically directed at the production of child pornography. At least half of such statutes do not require that the materials produced be legally obscene. Thirty-five States and the United States Congress have also passed legislation prohibiting the distribution of such materials; 20 States prohibit the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene.

Id. at 749 (footnotes omitted).

The Court's focus when scrutinizing the legislation was also important in finding the New York legislative judgment passed first amendment muster.[259] Any time a reviewing court passes on the constitutionality of a statute, it is faced with a number of choices between or among competing values, rights, or interests. The value preferences that a court must make reflect the interests not only of the litigants in the particular case, but also of society (however the court perceives that entity), and of the individual judge or judges hearing the case.[260] Within the range of available value choices, a court will choose one or more as the articulated basis for its decision. Other values may, however, serve as the real basis for the decision, albeit unconsciously or at least without being articulated.[261] The court's underlying value preference may have a great deal to do with the methodology of its review process.[262] In *Ferber*, for instance, the Court chose between two values in determining the focus of its analysis. The first and dispositive interest in the case was the protection of children from being exploited by being made to perform explicit depictions of sexual activity.[263] The other interest was the first

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[259] *Id.* at 758.

[260] Contrast this position with that of Professor Cox, who argues for a more principled form of jurisprudence:

> The function of the Court—the role implicitly assigned to it by history as well as the fact of its having been created as a court—is illuminated by contrast with the political branches. Its decisions are legitimate only when it seeks to dissociate itself from individual or group interests, and to judge by disinterested and more objective standards.
>
> The ability to rationalize a constitutional judgment honestly in terms of principles referrable to legal precedent and other accepted sources of law is, by the lawyers' tradition, an essential major ingredient of the Court's power to command acceptance and support. In the case of judicial rulings the power of legitimacy is thought to depend largely upon the realization that the major influence in a decision in not personal fiat, but principles which bind the judges as well as the litigants, and which apply uniformly to all men not only today but yesterday and tomorrow.

A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT (1976).

[261] *See generally* Prygoski, *Of Predispositions and Dispositions: An Attitudinal Study of Decisionmaking in Child Abuse and Neglect Cases*, 21 HOUS. L. REV. 883 (1984) (discussion of the manner in which unconscious factors may affect decisionmaking).

[262] *Id.*

[263] 458 U.S. at 753-66.

amendment free speech interest of the purveyors and consumers of movies and books that include children in depictions of sexually explicit acts.[264]

Justice White, writing for the majority in *Ferber*, appropriately showed great deference to the legislative decision to protect children from sexual exploitation by the means of a criminal statute proscribing the promotion of child pornography.[265] The Court's sympathy for, and deference to, the legislative scheme, allowed it to conclude that the *Miller* obscenity standard

> does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work.[266]

If the evil that the statute is designed to prevent is harm to children suffered from their appearance in sexually explicit movies or books, that harm occurs "whether or not the material . . . has a literary, artistic, political, or social value."[267] Justice O'Connor stated the point very well in her concurrence:

> For example, a 12-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph "edifying" or "tasteless." The audience's appreciation of the depiction is simply irrelevant to New York's asserted interest in protecting children from psychological, emotional, and mental harm.[268]

Justice Brennan's concurrence asserted a methodology of review that reflects a different value choice as the premise of analysis. He appears to have been more concerned with the free

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[264] *Id.*

[265] *Id.* at 761.

[266] *Id.*

[267] *Id.* (quoting memorandum of Assemblyman Lasher in support of N.Y. PENAL LAW).

[268] *Id.* at 774-75.

speech interests of purveyors and consumers than with the interest of the state in preventing the sexual exploitation of children.[269] This is not to say that Justice Brennan was unconcerned with the welfare of children in these situations, but rather that he prefered the free speech values over those advanced by the state through its child pornography statute. Justice Brennan argued that the application of a criminal statute "to depictions of children that in themselves do have serious literary, artistic, scientific, or medical value, would violate the first amendment."[270] He contended that:

> the limited classes of speech, the suppression of which does not raise serious first amendment concerns, have two attributes. They are of exceedingly 'slight social value,' and the State has a compelling interest in their regulation. The first amendment value of depictions of children that are in themselves serious contributions to art, literature, or science, is, by definition, simply not 'de minimis.' At the same time, the State's interest in suppression of such materials is likely to be far less compelling.[271]

In relation to the State's interest being less compelling, Justice Brennan argued that if the material produced had some serious literary, artistic, political or scientific value, then the child would not be as stigmatized by permanent record and circulation of his or her participation as would be the case with material that has no first amendment value.[272]

Although this argument has merit, it ignores the harm to the child caused by the production of the materials. Prevention of that harm remains a compelling state interest, irrespective of the categorization of the material by society.[273] Justice Brennan's priority system would sacrifice the welfare of children for the interests of consumers who wish to view works that meet the *Miller* criteria of nonobscenity. Under Justice Brennan's analy-

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[269] *Id.* at 775-77.
[270] *Id.* at 776.
[271] *Id.*
[272] *Id.* at 776-77.
[273] *See* notes 267-68 *supra* and accompanying text.

sis, a producer of sexually explicit movies, photographs, or books, that used children as live models, would be immune from governmental regulation unless the works were found to be obscene under the *Miller* test. What if the pictures were included in a medical textbook, but were also sold individually, to people with an interest in child pornography? Would the producer then be immune from criminal prosecution? Would he be punishable only for the sale of the photographs to individuals? Would it make any difference to the child in the pictures, who had no idea of the intended use?

If Justice Brennan primarily focuses on the first amendment interests of purveyors and consumers, his analysis is likely to stay within the traditional first amendment guidelines pertaining to obscenity. He would test each and every work to determine if it met the *Miller* criteria for obscenity. This case-by-case analysis would, in comparison to the majority's categorization approach, place much more material in the realm of protected speech. From the child models' perspective, the Brennan approach would allow for the victimization of many more children. The conclusion depends on the original value preference used by the individual members of the Court.

The majority in *Ferber* employed a categorization approach that simply classifies "child pornography as a category of material outside the protection of the first amendment."[274] "The question whether speech is, or is not, protected by the first amendment often depends on the content of the speech."[275] The majority stated:

> Thus, it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.[276]

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[274] 458 U.S. at 763.

[275] *Id.* (quoting Young v. American Mini-Theatres, 427 U.S. 50, 66 (1976)).

[276] *Id.* at 763-64.

Thus, in a case involving the regulation of "child pornography,"[277] the Court's only role is to determine whether the statute was legitimately enacted[278] and whether the trier of fact made a reasonable decision that the work fell within the statutory classification. The majority approach in *Ferber*, then, is virtually identical to the position espoused by Justice Sanford in *Gitlow* and *Whitney*:[279]

> In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional, and that the use of the language comes within its prohibition.[280]

Ferber is not only, in historical terms, a return to the judicial methodology of *Gitlow* and *Whitney*,[281] but also another example[282] of the legislative declaration that an identifiable conduct evil always accompanies a certain kind of speech activity. The substantive evil of exploitation and abuse of children by using them as live models in depictions of sexually explicit ac-

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[277] The majority in *Ferber* made it clear that "child pornography" must be adequately and narrowly defined by state law: "There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed." *Id.* at 764.

[278] Although the methodology of a reviewing court may be couched in terms of "categorization," balancing is still an implicit part of its analysis. In order to categorize certain speech as outside the protections of the First Amendment, the Court must defer to the balance struck by the legislature in its consideration of the interests involved. "When a definable class material . . . bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment." *Id.*

[279] *See* notes 13-35 *supra* and accompanying text.

[280] *See* note 32 *supra* (Justice Sanford writing for the majority in *Gitlow v. New York*, 268 U.S. 652, 670 (1925)).

[281] *See* notes 13-35 *supra* and accompanying text.

[282] *See* Young v. American Mini-Theatres, notes 109-95 *supra* and accompanying text.

tivities always attends the production of such a work, irrespective of the first amendment protection the work might otherwise enjoy.

Ferber is a recent example of a case in which the legislature asserted, and the Court accepted, simultaneity of conduct evil and speech.[283] Once the statutorily proscribed speech has been engaged in, there is no doubt of the occurrence of the conduct evil. As in *O'Brien*[284] and *Young*,[285] there is a one-hundred percent correlation between the legislatively defined substantive evil and the speech activity. Coupling this high correlation with the gravity of the evil involved in *Ferber*, it is not surprising that the Court simply declared child pornography to be outside First Amendment protection.[286]

D. American Booksellers Association, Inc. v. Hudnut[287]

The categorization approach accepted by the Court in *Ferber* was also argued in an attack on a municipal ordinance that made pornography, as defined by the ordinance, a form of exploitation and resulted in discrimination against women as a class.[288]

In *American Booksellers Association, Inc. v. Hudnut*, the Court of Appeals for the Seventh Circuit affirmed the holding of the district court that an Indianapolis ordinance that defined "pornography" as a practice that discriminates against women violated the first amendment freedom of speech protections.[289]

In passing the ordinance,[290] the Indianapolis-Marion County City-County Council ("Council") made the following findings of legislative fact:

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[283] 458 U.S. at 758.

[284] *See* notes 60-108 *supra* and accompanying text.

[285] *See* notes 109-95 *supra* and accompanying text.

[286] 458 U.S. at 763.

[287] 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985). The United States Supreme Court summarily affirmed the judgment of the Seventh Circuit. Chief Justice Burger, along with Justices Rehnquist and O'Connor dissented stating they wanted to set the case for oral argument. *See* 106 S.Ct. 1172 (1986).

[288] American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

[289] 771 F.2d at 334.

[290] For a discussion of this and other similar ordinances, see generally Gershel, *Evaluating a Proposed Civil Rights Approach to Pornography: Legal Analysis as if Women Mattered*, 11 WM. MITCHELL L. REV. 41 (1985); MacKinnon, *Pornography,*

> Pornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and maintaining sex as a basis for discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, access to and use of public accommodations, and acquisition of real property; promote rape, battery, child abuse, kidnapping and prostitution and inhibit just enforcement of laws against such acts; and contribute significantly to restricting women in particular from full exercise of citizenship and participation in public life, including in neighborhoods.[291]

"Pornography" under the ordinance is "the graphic sexually explicit subordination of women, whether in pictures or in words" in certain enumerated situations.[292]

Civil Rights, and Speech, 20 HAR. C.R. - C.L. L. REV. 1 (1985); Tigue, *Civil Rights and Censorship—Incompatible Bedfellows*, 11 WM. MITCHELL L. REV. 81 (1985); Note, *The Minneapolis Anti-Pornography Ordinance: A Valid Assertion of Civil Rights?*, 13 FORDHAM URB. L.J. 909 (1984-85).

[291] 598 F. Supp. at 1320 (citing INDIANAPOLIS CODE § 16-1(a)(2) (1984)).

[292] The entire definitional section is as follows:

> (q) Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
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> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
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> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
>
> (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
>
> (4) Women are presented being penetrated by objects or animals; or
>
> (5) Women are presented in scenarios of degradation, injury, abusement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; and
>
> (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.
>
> The use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section.

INDIANAPOLIS CODE § 16-3(q) (1984).

An important aspect of the ordinance, as with the statute in *Ferber*,[293] is that it makes no attempt to conform to the obscenity standards of *Miller*.[294] As in *Ferber*, the ordinance in *Hudnut* is not directed to the vindication of community standards of offensiveness.[295] Rather, it is an attempt to further some other goal, specifically the alteration of the manner in which men and women are socialized,[296] and, therefore, relate to one another.

The court of appeals purported to "accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets."[297] Despite its alleged acceptance of the premises of the ordinance, however, the court of appeals affirmed the invalidation of the ordinance because its "unhappy effects depend on mental intermediation."[298] In other words, "pornography" merely "affects how people see the world, their fellows, and social relations."[299] The court of appeals must have based its argument on the premise that some process of perception, processing, and conscious choice occurs between the consumption of pornography and the substantive evils that the ordinance is designed to prevent. Their analysis belies the court's contention that it accepted the premises of the ordinances. In terms of the analysis applied to the other cases discussed in this

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[293] *See* notes 247-69 *supra* and accompanying text.

[294] "The Indianapolis ordinance does not refer to the purient interest, to offensiveness, or to the standards of the community. It demands attention to particular depictions, not to the work judged as a whole. It is irrelevant under the ordinance whether the work has literary, artistic, political, or scientific value." 771 F.2d at 324-25.

[295] *Id.* at 325.

[296] *Id.*

[297] *Id.* at 329. By way of clarifying its acceptance of the legislative premise, the court of appeals asserts:

> In saying that we accept the finding that pornography as the ordinance defines it leads to unhappy consequences, we mean only that there is evidence to this effect, that this evidence is consistent with much human experience, and that as judges we must accept the legislative resolution of such disputed empirical questions.

Id. at n.2.

[298] *Id.* at 329.

[299] *Id.*

Article, the court of appeals was not satisfied that the Council established a sufficiently close nexus between the production and consumption of "pornography," and the occurrence of the substantive evils of subordination of women and sex discrimination.[300]

At one point, the court of appeals asserted that "[c]ases such as *Brandenburg v. Ohio* and *NAACP v. Claiborne Hardware* hold that a state may not penalize speech that does not cause immediate injury."[301] *Young*[302] refutes that proposition. It demonstrates that if the legislature is able to show a sufficiently high probability of a substantive evil following speech activity, the speech may be regulated even if imminency of substantive evil is not present.[303]

The "lack of immediate injury" argument should not be the dispositive factor in analyzing an ordinance such as the one in *Hudnut*. The real issue, which encompasses both time and probability, is the extent to which a court defers to the legislative declaration of a causal connection between the presumptively protected speech activity and the substantive evil that the legislature has a right to regulate.

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[300] Discussing the issue of whether the legislature established a sufficient empirical basis for its conclusion that "pornography" causes subordination of women and sex discrimination, the district court stated:

> Defendants again rely on *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed. 310 (1976), contending that since the legislation in that case was upheld upon a single affidavit of a sociologist that the location of adult movie theatres has a disruptive impact on the community, the Ordinance should be upheld because there is more than enough data to demonstrate that pornography harms women. As discussed above, however, the legislation in *Young* sought to regulate the place where pornography could be distributed, not to completely ban its distribution. Thus *Young* is not controlling.

598 F. Supp. at 1337 n.5.

To a certain extent, this explanation by the district court confuses the sufficiency of the empirical evidence supporting a law with the severity of the regulation the law imposes. Even though the attempted legislative means differed between *Young* and *Hudnut*, the goal or objective of the legislature in *Hudnut* certainly appears to be more solidly grounded in empirical data than does the causal connection on which the Detroit Commerce Council relied in *Young*.

[301] 771 F.2d at 333.

[302] *See* notes 109-95 *supra* and accompanying text.

[303] See note 224 *supra* for an example of a case in which a government may punish speech designed to incite illegal action at some future time.

IV. CONCLUSION

An analysis that focuses on the extent to which a court believes that a legislature established a sufficiently high correlation between speech activity and conduct evil will add clarity and consistency to the discussion of free speech issues. Although certain labels and categories are useful in describing how courts analyze free speech cases, it appears that courts consistently use a balancing approach which, consciously or unconsciously, reflects the importance a court may give to different value choices.[304] While it is helpful to discuss the intrinsic merits of each of the values that compete in free speech analysis, it is also useful to consider separation of powers and federalism principles as they enter in the first amendment equation.[305] These considerations, and the deference a court pays them, will determine the structure in which a court will review governmental action that allegedly abridges speech. That structure, be it a test, label, category or presumption, will in turn greatly affect the direction and process of a court's first amendment analysis.

Although *Gitlow* and *Whitney* are old cases which have little

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[304] Insofar as the Supreme Court has developed any general theory of the First Amendment it is the ad hoc balancing formula. The clear and present danger test and recently the incitement test have been employed in some cases in which the utterance might directly lead to a violation of law. Special rules have evolved in libel, privacy, and obscenity cases. But the Court's residual theory—its sole generalized formulation—has been ad hoc balancing. This test seems to be the only one acceptable to a majority for solving numerous First Amendment problems, such as those involved in denial of benefits or privileges, business regulations, legislative committees, free press-fair trial, and many other areas.

Emerson, *supra* note 39, at 717-18.

[305] In his dissent in Metromedia, Inc. v. San Diego, 453 U.S. 490, 556 (1980), Chief Justice Burger stated, "This is the long arm and voracious appetite of federal power—this time judicial power—with a vengeance, reaching and absorbing traditional concepts of local authority."

Justice Rehnquist also stated in his dissent in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 606 (1980):

> But to gradually rein in, as this Court has done over the past generation, all of the ultimate decision making power over how justice shall be administered, not merely in the federal system but in each of the 50 States, is a task that no Court consisting of nine persons, however gifted, is equal to.

present value as precedent,[306] they provide a useful point of departure for analyzing modern first amendment cases. In one sense, they are useful because the analysis of the United States Supreme Court, unsophisticated as it may now seem, dealt openly and primarily in the realm of the relationship between the federal judiciary and state legislatures. Concepts of federalism and separation of powers loomed very large in Justice Sanford's opinions in those cases.[307] Furthermore, those concepts were the starting point of the Court's analysis of the free speech claims in those cases.[308]

This focal point provides a framework of analysis that would allow a court to set forth the institutional and individual values in a given case, engage in whatever balancing process it deems appropriate, and decide the case free from the categories and labels which now seem to obfuscate, rather than clarify, free speech analysis. Questions of whether a given case is a clear and present danger case, a symbolic speech case, a zoning case, a child pornography case, or any other kind of case, would collapse into a straightforward articulation and balancing of the institutional and individual interests before a court. Perhaps all this Article asks is that the judicial system adjust its vision a few degrees so that we all may see things a bit more clearly.

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[306] *Whitney v. California* was overruled by the Court in *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969).

[307] *See* notes 13-36 *supra* and accompanying text.

[308] *Id.*